Mr. GOODELL remarked that since his paper upon the witch-trials appeared in the October serial, a reply to some portions of it had been read before the Society; and though he did not purpose to file a rejoinder, he would ask permission to state some additional considerations reinforcing his original argument, which will, at the same time, apply to the main points that have been made against it. He continued as follows: —

In the first place, to the point that there is a manifest distinction between the judicial system established by the province charter and that of the mother country, and that under the former no commissions of oyer and terminer could be issued except upon the previous authorization of the legislature. I would call the attention of the Society to the practice, to-day, in the Dominion of Canada, where the distinction between the legislative and judicial functions is very strictly observed, — certainly as strictly as in the province of Massachusetts Bay under the royal charter. There, notwithstanding the British North America Act, 1867, which is the organic law of the province, confers upon the governor-general the exclusive power of appointing the judges of the provincial courts, — with certain express exceptions, — the lieutenant-governors of New Brunswick and Ontario, in which provinces courts of oyer and terminer continue to be held, invariably issue the commissions for these courts; and what gives additional force to this as an instance in point, is the fact that while the constitutionality of this practice has never been questioned, the authority of the governor-general in respect to the *personnel* of the established courts is so jealously maintained that his exclusive right to appoint queen's counsel, both in New Brunswick and Nova Scotia, in spite of an act in each of those provinces expressly conferring that power upon

the governor of the province, has been judicially determined by the Supreme Court of Canada.[1]

In another aspect, the parallel between the present practice in New Brunswick and that of the province of Massachusetts Bay, in the issuing of commissions of oyer and terminer, is still closer; for, by clause 14 of section 92 of the British North America Act, "the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts both of civil and criminal jurisdiction," is wholly and exclusively devolved upon the provincial legislature, which has no power to delegate this authority in any particular. It follows, therefore, that the issuing of a commission of oyer and terminer by the lieutenant-governor is there clearly understood to be a proceeding essentially different from the act of constituting a criminal court, within the meaning of the act of parliament.

Again, it is said that "the General Court did stay 'the evil'" of the witch-trials, "in a most effectual manner, by abolishing the court of oyer and terminer;" that "they bounced this tribunal within a year, and finally passed an act rendering any such future abuse of power impossible."

If this terse and emphatic language is employed to describe the effect of the supersedure of the Court of Oyer and Terminer by the establishment of the Superior Court of Judicature, the implication is extravagantly gratuitous. There never was any express dissolution of the Court of Oyer and Terminer. As has been already shown, its functions ceased, *ipso facto*, the moment a competent court of assize and jail delivery began its sessions within the same jurisdiction. That such a court would be held in Essex County was foreseen when the act establishing the Superior Court[2] was passed at the session of the assembly which began on the 12th of October; and an extraordinary term of assize and jail delivery was specially appointed by the legislature during the same session,[3] for the purpose of trying fresh in-

[1] Lenoir *et al. v.* Ritchie, 3 Duval, 575. [2] Province Laws, 1692–93, chap. 33.

[3] *Ibid.*, chap. 45. From Sewall's Diary, under date of Oct. 26, 1692, it appears "that the Court of Oyer and Terminer" counted "themselves dismissed," by the vote on a bill for a "Fast and Convocation of Ministers, that [we] may be led in the right way as to the witchcrafts." This was a measure promoted by the friends and relatives of the accused. Three days later, according to the same authority, Governor Phips decided that the court "must fall."

dictments for witchcraft. This court, so far from being essentially a new tribunal, was held, with a single exception, by judges, with Stoughton still at their head, who had sat in the former trials.

The new court of assize recommenced the work of prosecuting witches with increased vigor. The new grand juries, obedient to the charges of the court, found fresh bills of indictment for witchcraft; and it is said that not less than fifty-six of these were preferred at the first term. Certain it is that, at the special term at Salem, at the first regular term for Middlesex, in the same month, and at the term held at Ipswich, in the following month, thirty-one indictments against persons accused of covenanting with the Devil or practising acts of witchcraft were tried, and that in all but three of these cases the petit juries found verdicts of "not guilty." Those who were not acquitted were afterwards reprieved or pardoned.

It would seem therefore, after all, that we are more indebted to the practical common-sense of that most popular tribunal, *the jury*, than to all other influences, for putting a stop to those scenes of horror which all the rules of evidence, as then understood and practised in the most enlightened courts, all the skill and acumen of a trained attorney for the prosecution, and all the wisdom of a grave, learned, and pious bench of judges, were powerless to prevent.

It is an important fact, but one which seems to have been overlooked by all writers upon these witch-trials, that, in the later cases of witchcraft, the jurors were chosen by, and from among, all those inhabitants of the province who possessed the requisite amount of property to qualify them as electors under the new charter. The act requiring this qualification for jurors was passed Nov. 25, 1692;[1] and though an earlier act had prescribed the same qualification for jurors serving at the courts of general sessions and of common pleas,[2] no such rule had been made or adopted for the Special Court of Oyer and Terminer. The only *venire* for this last-named court, that has been preserved,[3] was for the September term, and is directed to the sheriff, requiring him to impanel and return,

[1] Province Laws, 1692–93, chap. 33.

[2] *Ibid.*, chap. 9.

[3] Woodward, vol. i. p. 10.

as petit jurors, "good and lawful men of the *freeholders and other freemen*" of his bailiwick. Thus it seems that before the assizes were established, the jurors were chosen, as in colonial times, from among the *freemen* only; and these being, by the old law, necessarily church members, were more likely to obey implicitly the directions of the judges, — with whose prejudices they were in full sympathy, — than were those selected, in each town, by the whole body of electors, which had been enlarged and liberalized, in conformity with the requirements of the charter, by the inclusion of a considerable proportion of respectable persons not members of the orthodox communion.

That the influence of this new element in the body politic was felt in the matter of selecting jurors for the Superior Court, appears, to some extent, in the rejection of numerous indictments laid before the grand juries, though not in so marked a degree as in the large proportion of verdicts of acquittal.

Another groundless insinuation ought not to be permitted to pass unchallenged; and that is that the eminently conservative profession of the law, which has never, as such, encouraged, much less started, any political or legal reform, would have furnished the world an exceptional example of high thinking and just dealing if it could have had the exclusive management, *secundum artem*, of the witch-trials.

Lawyers, naturally and honestly enough, are inclined to ascribe all errors and follies of the courts to the want of professional training in the judges, and laymen are too ready to accept this interested judgment as conclusive. But this assumption is only pardonable because the habitual professional prejudice upon which it is founded has too long been amiably or ignorantly tolerated. It is notorious that the Romillys of the legal profession, however eventually successful as reformers, are always in an exceedingly small minority, and that their merits are seldom understood and appreciated by their contemporaries of the gown. We of this generation are witnesses of a remarkable illustration of this professional conservatism. For more than a century and a half after the juries in Essex and Middlesex had turned the tide of persecution against the alleged witches, the lawyers both of Old and New England stubbornly adhered to, and the judges continued to expound with every refinement of reason-

ing, a stupendously absurd system of evidence apparently contrived to make the judicial ascertainment of truth as difficult as possible; and while we are saved from despair over the prospect of ultimately mitigating or removing other flagrant evils in our judicial system by the knowledge that this learned rubbish has at length been finally relegated to the oblivion it deserves, it is still not to be denied that the lawyers who are unreconciled to the common-sense innovation by which this obstruction to justice was overcome, are not among those who are held in lowest repute for their professional ability and attainments.

The testimony admitted in the witch-trials, here in 1692, was, I repeat, admissible by the rules of evidence then generally recognized by the most eminent lawyers; and as to the crimes alleged, the indictments, in some instances, were copied, *verbatim*, from the most approved precedents.[1] Newton, the first prosecuting attorney, was, as has been said, a trained lawyer; and while it would be unjust to charge upon him the sole responsibility for the results of the so-called trials in the Court of Oyer and Terminer, or even for the manner in which those trials were conducted, — the admission of spectre evidence, the assumption that the accused were guilty, the inducements used to extort confessions, and the

[1] It is hard to form a satisfactory conjecture as to the cause of the confusion in the forms of indictments preferred at different times during the course of these prosecutions. In two instances only — the second indictments against Rebecca Eames and Samuel Wardwell, respectively — was the felony expressly charged to be in violation of the statute of James I. These indictments appear to have been drawn in blank by Newton, or under his direction, and to have been subsequently filled in by Checkley; but the latter, in the indictments which he himself drew, made the allegation of the breach of the law broad enough to comprise, also, the colonial ordinance. Again, it is not improbable that the violation of different statutes may have been purposely charged on account of the very uncertainty of the law, and, where different indictments were found against the same person, from a desire to hold the prisoner to answer to at least one valid indictment. On the other hand, there is no indication of any doubt or scruple in the minds of the judges, who, in that period of loose criminal practice, were probably not more solicitous for the safety of culprits than were contemporary judges in England, and who doubtless were entirely satisfied with the very general advice of the reverend clergy, in their "Return," to them and their associates in the council: "Nevertheless, we cannot but humbly recommend, unto the government, the speedy and vigorous prosecutions of such as have rendered themselves obnoxious, according to the directions given in the laws of God and the wholesome statutes of the English nation, for the detection of witchcrafts." — *Hutchinson's Hist.*, vol. ii. p. 51.

menaces against those who denied their guilt; all of which he must, at least, have approved of or connived at, — the candid student of those judicial proceedings will not fail to notice that it was not until after this thoroughbred lawyer had been superseded as prosecuting attorney that the juries began to acquit.

In regard to the copy of the act to reverse the attainders, &c., in the court files at Salem, I did not at first deem it important to refer to the handwriting further than to mention that the copy was made in the Secretary's office, although the experts at the State House were confident that other manuscripts, evidently by the same hand, were Addington's; but an intimation that the actual passage of the act in question has not been put beyond all doubt by the evidence already adduced, makes it important for me to say, here, that a critical comparison of the copy at Salem with specimens of Secretary Addington's handwriting of about the same date, the genuineness of which is unquestionable, leaves no doubt that the copy procured by Sewall was written by the Secretary himself, and has, therefore, the value of an authentic transcript, although it does not now bear, if it ever did, any formal attestation.

It should also be mentioned that this copy is not the only contemporary evidence, besides the record and the printed act which has been heliotyped, of the passage of the act; for the petition of Samuel Wardwell in behalf of his mother (Feb. 19, 1711–12) declares that her "name is not inserted in the late Act of the General Court, for the taking off the attainder of those that were condemned;" and Elizabeth Johnson, junior, in her petition (of the same date), after stating that the General Court "hath lately made an Act for taking off the Attainder of those that were condemned for witchcraft in the year 1692," represents that her name "is not inserted in said act," and prays that, if possible, it may be so inserted.[1]

Mr. GOODELL also produced a copy of Governor Shirley's proclamation, advertising the stamps which were issued to raise money to defray the expenses of the expedition against Crown Point at the beginning of the French War. He exhibited the first printed form of an original writ ever used

[1] See these petitions on file in the Clerk's office, or as printed by Woodward, vol. ii. pp. 242, 243.

in Massachusetts; and a broadside giving the news of the preliminaries of the peace of Ryswick, in 1697.

Mr. WINSOR introduced a letter from Mr. Charles G. Leland, of Philadelphia, in which he spoke of the very large number of Indian legends which he had collected, and of the Norse-like element in the myths, which he pronounced fully equal to anything in the Edda. There is still extant in New England and Canada an almost undiscovered literature of this sort, which is of immense value.

A new serial, including the Proceedings for November and December, was laid on the table by the Recording Secretary at this meeting.

Dr. CLARKE contributed a Memoir of the late Rev. Dr. William Newell.